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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

In re G.S. et al., Persons Coming Under the Juvenile
Court Law.

C081432

LASSEN COUNTY DEPARTMENT OF HEALTH
AND SOCIAL SERVICES,

(Super. Ct. Nos. J6114, J6115)

Plaintiff and Respondent,

v.

V.S.,

Defendant and Appellant.

Victor S., father of the minors, appeals from orders of the court taking his petition for modification off calendar and terminating his parental rights. (Welf. & Inst. Code, §§ 388, 366.26.)¹ Father contends he was denied due process and statutory protections

¹ Further undesignated statutory references are to the Welfare and Institutions Code.

because he did not have notice of the proceedings until after the section 366.26 hearing was set, and the juvenile court denied his petition for modification without a hearing. Father also contends that trial counsel was ineffective for failing to object to continued use by the Lassen County Department of Health and Social Services (Department) of an invalid address and that the Department failed to exercise due diligence to locate him. We affirm.

I. BACKGROUND

In February 2015, the Department filed petitions to detain J.S., age 16, G.S., age 14, and Y.S., age 10, based on allegations that mother's boyfriend physically abused Y.S., that mother failed to protect Y.S., and that the siblings were at risk of similar harm.² The petition further alleged that father's whereabouts were unknown and he had failed to provide support for the minors.

The detention report stated that J.S. and an adult brother, A.S., were subjects of a dependency in Los Angeles County from 1999 through 2001 because the parents exposed the minors to domestic violence, elder abuse and an unsanitary home. G.S. was born during that dependency. All of the minors were subjects of a second dependency in Los Angeles County from January 2010 through June 2011 due to father's physical abuse of J.S. and Y.S., animal cruelty by father, domestic violence and a filthy home. Los Angeles County was unable to locate father during that dependency, however, he was found to be the presumed father of these minors. In the current proceeding, the Department began to investigate father's whereabouts by questioning mother and the minors, who all said they did not know where he was. Mother said the last time she knew where father was or that the minors had seen him was at least five years ago. Mother

² The appeal involves only the minors G.S. and Y.S.

believed he was in the Los Angeles area. Mother said she had full custody of the minors and was no longer married to father.

At the detention hearing, mother's counsel was provided with a parentage inquiry form for mother, mother was sworn and examined, and the court found father was the presumed father of the minors and that his mailing address was unknown. The court ordered the minors detained and appointed counsel for father.

The jurisdiction report filed in February 2015 contained father's criminal history, which included various arrests and convictions from 1992 to 2011 involving violence and theft offenses. All the offenses occurred in the greater Los Angeles area, with the last arrest in Lomita, California. The report stated the Department had attempted to locate father but had been unable to do so. The Department had secured a last known address in Palmdale, California from the earlier dependency case in Los Angeles County. J.S. said that he and his siblings wanted to live with their older brother, A.S. Notice of the jurisdiction hearing was sent to father at the Palmdale address. The notice was returned as "not deliverable as addressed unable to forward" on March 23, 2015. Mother was not present at the contested jurisdiction hearing. The court sustained the petition and set a disposition hearing.

The report for the disposition hearing stated father's whereabouts were still unknown and there was no new search information, although the report now listed the Palmdale address as father's mailing address. The report said that mother and father were divorced after Y.S. was born and mother and the minors had moved from Southern California to Northern California four years ago. The minors were placed with A.S. in April 2015. The Department did not recommend services for father because it had been unable to locate him. Notice of the disposition hearing and a copy of the disposition report were sent by certified mail to father at the Palmdale address. At the disposition hearing, the court adopted the Department's recommendation for services to mother and set a six-month review hearing. The minute order is silent on the issue of services to

father. The court's written orders for the hearing simply do not address the question of services for father and do not state that the court denied reunification services to father pursuant to section 361.5, subdivision (b)(1), only that contact between father and the minors would be detrimental to the minors.

The six-month review report recommended terminating mother's services and setting a section 366.26 hearing. The minors remained in placement with their adult brother and the maternal grandmother. The report continued to list the Palmdale address for father, although his whereabouts remained unknown. Notice of the review hearing was sent to father at the Palmdale address but was returned as not deliverable. At the hearing in September 2015, the court terminated mother's services and set a section 366.26 hearing.

Notice of the section 366.26 hearing was initially sent to father at the Palmdale address and again returned as undeliverable. At some point thereafter, the Department secured a new address and telephone number for father in Lomita, California from child support. The Department made contact with father and sent notice of the section 366.26 hearing to him there.

The assessment for the section 366.26 hearing stated that the California Department of Social Services (CDSS) and the Department determined that G.S. and Y.S. were likely to be adopted and recommended a permanent plan of adoption with A.S. Because the adoptive process was not likely to be completed before J.S. was 18 years old, CDSS recommended a permanent plan of guardianship for J.S. with A.S. as guardian. During the eight months the minors had lived with A.S., he had demonstrated the ability to set limits and provide a nurturing environment for the minors, who accepted him as caregiver.

In January 2016, father filed a petition for modification (§ 388) of the disposition orders, which had not offered him services and found visitation detrimental, and the order setting the section 366.26 hearing. Father alleged as changed circumstances that he had

no knowledge of the dependency proceedings until the Department located him at the Lomita address. Father further alleged that the mother, maternal grandmother and A.S. all knew how to contact him through a telephone number, which had not changed in 10 years. Father alleged the modification was in the minors' best interests because they "would be better off being cared for by a loving, responsible parent than by a young and inexperienced brother." Father was seeking orders for reunification services, including visitation, and to vacate the section 366.26 hearing.

In January 2016, the court heard both the petition for modification and section 366.26 issues, addressing the petition for modification first. Counsel for the Department stated that the Department became aware of father's current address through child support in mid-November 2015. Immediately thereafter, the social worker contacted father, confirming the address, and sent him notice, which he received December 2, 2015. The Department's counsel noted that Los Angeles County had been unable to locate father for the last dependency in that county and the Palmdale address was listed as father's last known address in their file. The Department had followed up on all leads they had received, ultimately locating father through information from child support. Counsel for the Department argued that father received not only notice of the section 366.26 hearing, but all reports, yet he waited for two months to file the petition for modification. Father's counsel stated that father said he never got a report until she e-mailed him one and he did not know that he had an attorney or how to contact her. The Department responded that a return receipt signed by father and proofs of service indicated father did receive the reports.³ The court noted that there was no objection made at the disposition hearing that the Palmdale address was not correct. Father's

³ We note that the second page of each report contains a list of counsel with contact information and identifies who each attorney represents.

counsel observed that she never sent him mail at the Palmdale address because the Department had already said that they were unable to contact father at that address.

The court first addressed whether father was entitled to a hearing on the petition for modification. Because notice was sent to father's last known address and no one objected either at the disposition or currently that it was not a valid address, the court declined to hear the matter and took it off calendar. During argument on the termination issue, father's counsel stated that notice was sent to an address where father had not lived in years. Minor's counsel stated that the minors strongly felt they wanted a permanent plan of adoption and had no desire to have contact with father. The court followed the Department's recommendation and terminated parental rights as to G.S. and Y.S.

II. DISCUSSION

A. Notice of the Proceedings

Father argues he was denied his statutory and due process right to notice of the proceedings when the Department failed to give him notice of the proceedings until the section 366.26 hearing.

When the social worker detains a minor and files a petition, section 290.1 requires notice of the initial petition hearing to designated persons, including presumed fathers, whose whereabouts are known. (§ 290.1, subd. (a).) When a petition is filed, section 290.2 also requires notice to designated persons, including presumed fathers whose address is known, of the detention hearing and specifies the time frames for notice depending on whether the minor has, or has not, been retained in custody. (§ 290.2, subds. (a), (c).) Here, the social worker asked mother and the minors about father's whereabouts. They said they did not know where father was and had not seen him in the last five years. Thus, they had not had contact with father before the family left the Los Angeles area, where father was believed to have lived. Due to the lack of information, no notice to father was required at that time under either section. (§§ 290.1, subd. (a), 290.2, subd. (a).)

Section 316.2, subdivision (a) requires the court to “inquire of the mother . . . as to the identity and address of all presumed or alleged fathers.” The minutes of the detention hearing show that mother was sworn and testified, presumably in compliance with this section. There is no indication mother had any more information on father’s whereabouts at the detention hearing than she had when questioned by the social worker.

After the initial hearing, when the person to be noticed is not present at the initial petition hearing and the child is detained, the person to be noticed “shall be noticed by personal service or by certified mail, return receipt requested.” (§ 291, subd. (e)(1).) If the residence of the parent is unknown, then notice is to be given to any adult relative residing within the county. (§ 291, subd. (a)(7).) Initially, the Department had no address for father and no information about paternal relatives. The first notice of the jurisdiction hearing, sent in February 2015 after the detention hearing, was sent to mother and the minors. By the second notice, the Department had found a last known address for father through the most recent dependency case in Los Angeles County and sent notice of the hearing to the Palmdale address by certified mail. The return receipt indicated the notice was not deliverable as addressed. The Department also had received father’s criminal history but it did not clarify his whereabouts. The Department complied with the requirements of section 291, insofar as it was possible, by its continued efforts to locate father and sending notice to a last known address.

Section 293 requires that notice of the review hearing pursuant to section 366.21 be by first class mail addressed to the last known address. (§ 293, subd. (e).) The Department mailed notice of the six-month review hearing to father’s last known address in Palmdale by certified mail. The notice was again returned as not deliverable. The Department complied with section 293.

Section 294 requires that notice of the selection and implementation hearing be given to the presumed father, or the grandparents if their address is known and the father’s whereabouts are unknown. (§ 294, subd. (a)(2), (5).) Service may be

accomplished by certified mail, return receipt requested, to the parent's last known mailing address. (§ 294, subd. (f)(2).) However, if the parent's identity is known but the whereabouts are unknown and the parent cannot, with reasonable diligence, be served by certified mail or personal service, the Department is required to file an affidavit with the court describing the efforts to locate and serve the parent. (§ 294, subd. (f)(7).) Here, the Department first served notice of the selection and implementation hearing on father at his last known address in Palmdale. Thereafter, the Department gained additional information on father's whereabouts from child support records and was able to locate and serve notice of the selection and implementation hearing and all reports on him in compliance with the statute.

Father asserts that, because services cannot be denied an absent parent pursuant to section 361.5, subdivision (b)(1) without the evidentiary support of an affidavit or other proof that a reasonably diligent search failed to locate the parent, the Department should have filed an affidavit of due diligence prior to the disposition hearing and did not do so. As set forth above, the court did not deny father services pursuant to section 361.5, subdivision (b)(1). The court simply did not make any order regarding services for father. Thus, the requirement of proof of reasonable diligence was not triggered. The record does not disclose all the steps taken by the Department to locate father, but the steps which were taken did result in a last known address to which notice was sent, and ultimately father's current address and telephone number.

The dependency statutes provide a framework for giving early and complete notice to parents of the proceedings and an opportunity to be heard during the various stages of the dependency, thereby affording constitutionally-mandated due process to parents at each step in the dependency proceeding. (*Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 547.) While the Department's search could have been more robust, it nonetheless did exercise reasonable diligence by questioning mother and the minors, seeking information from Los Angeles County records in the most recent dependency

and, when a last known address was located, sending notice to father by certified mail, return receipt requested. Further, the Department continued to seek father's location and, through child support, was eventually successful.

Although a more detailed record of the Department's efforts would be reassuring, the record does provide an adequate showing of reasonable diligence to locate father. This is not a case of complete failure to attempt notice or failure to give notice when an address is known. The Department's ongoing efforts did eventually produce a valid address. No violation of either due process or statutory notice requirements appears.

B. Abuse of Discretion

Father argues the juvenile court abused its discretion in "denying" his section 388 petition for modification.⁴

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances.⁵ "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is preponderance of the evidence.

⁴ We observe that the court did not deny or dismiss the petition. The juvenile court took the petition "off calendar." Such an order generally contemplates that the matter will be put back on calendar at some point in the future. Here, however, the juvenile court proceeded to terminate parental rights, rendering the section 388 petition moot. We construe this to be a denial of the petition by operation of law. However, since the court did not rule, the denial does not carry the presumption of correctness normally afforded an order denying a petition. (*Denham v. Superior Court of Los Angeles* (1970) 2 Cal.3d 557, 564.)

⁵ Section 388 provides, in part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (§ 388, subd. (a)(1).) The court must set a hearing if "it appears that the best interests of the child . . . may be promoted by the proposed change of order." (§ 388, subd. (d).)

[Citation.]” (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*In re Stephanie M.*, *supra*, at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parent’s interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

To establish the right to an evidentiary hearing, the petition must include facts which make a prima facie showing that there is a change in circumstances and “the best interests of the child may be promoted by the proposed change in order.” (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; see *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414; Cal. Rules of Court, rule 5.570(e)(1).) More than general conclusory allegations are required to make this showing even when the petition is liberally construed. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) “The prima facie requirement is not met unless the facts alleged, if supported by evidence[,] . . . would sustain a favorable decision on the petition.” (*In re Zachary G.*, *supra*, at p. 806.) “In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case.” (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

A section 388 petition may be used to raise a procedural due process violation. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 483-488; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The allegations of the petition must show more than mere lack of notice, they must show that, had there been proper notice, the outcome of the challenged hearings would have been different. (*Id.* at pp. 192-193.)

Father's 388 petition alleged only that he had no knowledge of the dependency proceedings until the Department contacted him; that mother, the maternal grandmother and A.S. knew his telephone number, which had been unchanged for 10 years; and that the proposed modification was in the minors' best interests because they would be better off being cared for by a loving responsible parent than by a young and inexperienced brother.

The allegations do not state that notice was sent to an incorrect address where father had never lived or received mail, that father had addressed the issues of domestic violence and physical abuse of the minors from the prior dependency, or that, despite the findings in the current dependency that he had failed to support the minors, he had either provided support or lacked the means to provide support for the minors. Further, father did not allege that he had been prevented from maintaining contact with the minors for the last five years or that he had any ability to meet the minors' current needs. He alleged only that he would be a better caretaker than the minors' adult brother.

The court viewed the allegations in light of the history of the case and noted the primary defect in the petition was the lack of objection at any time that the Palmdale address was incorrect. The defect was fatal since, to the extent that the Palmdale address was identified as a last known address, the Department's mailings to that address satisfied due process unless, and until, a new address was known.

Even assuming that father established changed circumstances by showing lack of notice, father's conclusory statement did not allege facts to show that the proposed change, which would delay permanency and stability for the minors, was in their best interests. The court had evidence of the prior dependency where father was found to have engaged in domestic violence and physical abuse of the minors. Father had been out of contact with the minors even before they moved to Northern California and, because of their history with him, the minors did not want to renew a relationship with him. Finally, the evidence before the court was that the adult brother had been and

continued to be an exemplary caretaker and provided the minors a stable home. Had the court actually ruled, father had failed to state a prima facie case and the court would not have abused its discretion in denying a hearing on the section 388 petition.

C. Ineffective Assistance of Counsel

Father contends trial counsel was ineffective for failing to object to use of the Palmdale address for notice, because it was incorrect, at either the disposition hearing or at the combined section 388/selection and implementation hearing.

A parent claiming ineffective assistance of counsel has the burden of showing that counsel failed to act in a manner to be expected of reasonably competent counsel and that “counsel’s representation fell below an objective standard of reasonableness.”

(*Strickland v. Washington* (1984) 466 U.S. 668, 688 [80 L.Ed.2d 674, 693]; *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.) The parent must also show prejudice, that is, “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland v. Washington, supra*, at p. 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

“Reviewing courts will reverse . . . on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his [or her] act or omission.” (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) When the record is silent on the reasons that counsel acted as she did, the case must be affirmed “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” (*People v. Pope* (1979) 23 Cal.3d 412, 426, abrogated on other grounds as acknowledged in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) “[I]ncompetent counsel does not mean the parent was in fact harmed as a consequence.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1152.)

Father did not object to counsel’s representation in the trial court. Accordingly, counsel was not asked to explain the reasons for her actions. Thus, we must determine

whether there could be no satisfactory explanation for counsel's failure to object to use of the Palmdale address at disposition.

At disposition, counsel was aware that the Department was treating the Palmdale address as a last known address garnered from records in the most recent Los Angeles dependency case, although certified mail sent there was returned as undeliverable. However, there was nothing to indicate that a better address was available. Mother and the minors had not had contact with father in several years and father's criminal records did not suggest he might be incarcerated or on parole. Counsel was aware that, where a parent cannot be located despite a reasonable search effort, failure to give actual notice would not render the proceedings invalid. (*In re Claudia S.* (2005) 131 Cal.App.4th 236, 247.) As we have explained, the search satisfied the reasonable diligence standard and the Department did not seek to deny services to father pursuant to section 361.5, subdivision (b)(1). Counsel had no reason to object to a disposition which left open the option for services should father be located during the reunification period.

At the combined hearing, father's counsel had, by then, consulted with her client. The most she was able to say, based on that consultation, was that father had not lived at the Palmdale address for years. This suggests that the Palmdale address was, in fact, a last known address as the Department believed. Given that, counsel could not have objected the address was incorrect.

It is true that, in hindsight, the case could have been more carefully litigated by both the Department and father's counsel to produce a record with greater factual clarity. On this record, however, it is not possible to conclude that counsel had no satisfactory explanation for her tactical choices. Father has not demonstrated that counsel's representation was inadequate.

III. DISPOSITION

The orders are affirmed.

/S/

RENNER, J.

We concur:

/S/

BUTZ, Acting P. J.

/S/

DUARTE, J.